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No. 90-1932

In the Supreme Court of the United States

OCTOBER TERM, 1991

SHEARN MOODY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether ¶ 7 of 18 U.S.C. 152, which prohibits the fraudulent concealment or transfer of property "in contemplation of a case under title 11 * * *, or with intent to defeat the provisions of title 11," applies only to conduct carried out "in contemplation of a case under title 11."

2. Whether, based on petitioner's fraudulent transfer and concealment of property in which he had an interest, petitioner was properly convicted of fraudulently concealing "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and of fraudulently transferring and concealing "his property" under 18 U.S.C. 152 ¶ 7.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 923 F.2d 341.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1991. A petition for rehearing was denied on March 12, 1991. Pet. App. 24a. The petition for a writ of certiorari was filed on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of bankruptcy fraud. He was convicted of fraudulently concealing property belonging to the estate of a debtor, in violation of 18 U.S.C. 152 ¶ 1, and fraudulently transferring and concealing his property, in violation of 18 U.S.C. 152 ¶ 7. He was sentenced to concurrent five-year terms of imprisonment and fined $5000 on each count. The court of appeals affirmed. Pet. App. 1a-23a.

1. In June 1983, petitioner filed a petition for relief under the Bankruptcy Code (11 U.S.C.). In the bankruptcy petition, petitioner listed as an asset his interest in the Seaside Lanes partnership. The partnership consisted of petitioner, his mother, and his brother, Robert Moody. They had formed the partnership to own and manage properties that they held individually or as beneficiaries of trusts created for them by petitioner's father. Among those properties was a bowling alley. Pet. App. 2a.

In June 1984, the partnership sold the bowling alley for approximately $500,000 and invested the proceeds in a certificate of deposit at the Moody National Bank. After learning of the sale, petitioner's attorney told Robert Moody, chairman of the board of the bank, that the certificate of deposit belonged to petitioner's bankruptcy estate and that the proceeds of the certificate could not be disbursed without an order from the bankruptcy court. When the certificate matured in December 1984, however, Robert Moody wired the proceeds to the partnership's account at another bank. Three days later, petitioner wrote three checks on the account totalling $201,000, which he then converted to cashiers checks in smaller denom-

inations. Petitioner cashed the checks over the next several months. Pet. App. 2a-4a.

Petitioner did not disclose to the bankruptcy trustee that he had taken money from the partnership account until he was deposed in the bankruptcy case in July 1985. A superseding indictment charging petitioner with one count of violating 18 U.S.C. 152 ¶ 1 and one count of violating 18 U.S.C. 152 ¶ 7 was filed in the Southern District of Texas in April 1989, and petitioner was convicted on both counts. Pet. App. 4a-5a.[1]

2. The court of appeals affirmed petitioner's convictions. Pet. App. 1a-23a. The court of appeals rejected petitioner's argument that 18 U.S.C. 152 ¶ 7 applies only to conduct that occurs before a petition for bankruptcy is filed.[2] The court observed that ¶ 7 prohibits concealment or transfer of assets "in contemplation of a case under title 11 . . ., *or with intent to defeat the provisions of title 11*." Pet. App. 9a. Because of this disjunctive structure, the court reasoned, the provision was not limited to conduct carried out "in contemplation of a case under title 11," as petitioner had argued. *Id.* at 10a. The court noted that its interpretation was supported by prior decisions upholding convictions under ¶ 7 based on post-petition con-

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[1] The bankruptcy fraud charges were severed from another indictment that charged petitioner and a co-defendant with thirteen counts of mail and wire fraud. Pet. App. 4a & n.2.

[2] 18 U.S.C. 152 ¶ 7 provides:

> Whoever, either individually or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against him or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation [shall be fined or imprisoned, or both].

duct. *Id.* at 10a-11a (citing *United States* v. *Parkhill*, 775 F.2d 612 (5th Cir. 1985) and *United States* v. *Turner*, 725 F.2d 1154 (8th Cir. 1984)).

The court also rejected petitioner's argument that the two counts in the indictment were "factually repugnant." Pet. App. 6a. Petitioner had argued that his withdrawal of money from the Seaside Lanes partnership account could not be both a fraudulent concealment of "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and a fraudulent concealment or transfer of "his property" under 18 U.S.C. 152 ¶ 7.[3] The court observed that petitioner's argument depended on a distinction between "property of the estate" and "property of the debtor" that was not reflected in the statute. Pet. App. 8a-9a. Paragraph 7, the court noted, "does not use the term 'property of the debtor.'" *Id.* at 10a. The court accordingly refused to "give the plain wording and meaning of ¶ [7] the strained, hypertechnical reading urged by [petitioner]." *Ibid.*

ARGUMENT

1. Petitioner renews his contention that 18 U.S.C. 152 ¶ 7 does not apply to conduct that occurs after a bankruptcy case commences. The court of appeals correctly rejected that contention.

As the court of appeals concluded, the plain language of ¶ 7 defeats petitioner's contention. Pet. App.

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[3] 18 U.S.C. 152 ¶ 7 is set forth at note 2, *supra*. 18 U.S.C. 152 ¶ 1 provides:

> Whoever knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any case under title 11, any property belonging to the estate of a debtor [shall be fined or imprisoned, or both].

10a. Paragraph 7 applies when assets are fraudulently concealed or transferred "in contemplation of a case under title 11 * * *, *or* with intent to defeat the provisions of title 11." 18 U.S.C. 152 ¶ 7 (emphasis added). The disjunctive connector, "or," means that a violation of ¶ 7 may be proven either by proof that the defendant acted "in contemplation of a case under title 11" *or* by proof that he acted "with intent to defeat the provisions of title 11." See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 73 (1984); *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979); *FCC* v. *Pacifica Found.*, 438 U.S. 726, 739-740 (1978). That the two phrases are to be construed independently is reinforced by the comma separating them. *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

Petitioner argues that the disjunctive language of ¶ 7 should be ignored because the legislative history supports a "conjunctive reading." Pet. 10. This Court has consistently rejected the notion that legislative history can be used to overcome the plain language of a statute. *E.g.*, *Toibb* v. *Radloff*, 111 S. Ct. 2197, 2200 (1991); *Business Guides, Inc.* v. *Chromatic Communications Enterprises, Inc.*, 111 S. Ct. 922, 928 (1991); *United States* v. *Rojas-Contreras*, 474 U.S. 231, 235 (1985). In construing the Bankruptcy Code, the Court has stated that "where * * * the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). That statement applies with full force in this case.[4]

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[4] Petitioner cites *McNally* v. *United States*, 483 U.S. 350 (1987), as a case in which disjunctive statutory language was read conjunctively. *McNally* is inapposite here. In *McNally*, the Court held that the mail fraud statute did not apply to fraudulent schemes involving intangible rights, such as the right to honest government. The Court determined that, although dis-

In any event, the legislative history does not support petitioner's argument. What is now ¶ 7 was added to the bankruptcy fraud statute in 1926; the 1926 provision had the same disjunctive structure as the current provision.[5] Petitioner does not cite anything in the legislative history of the 1926 provision suggesting that—contrary to its plain language—it was meant to be read conjunctively.[6]

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junctive language in the statute arguably supported a contrary reading, the statute as a whole was ambiguous. *Id.* at 358-360. To resolve that ambiguity, the Court resorted to the legislative history of the statute and to the rule of lenity. *Id.* at 356-360. As discussed in the text, resort to legislative history is unwarranted here because the statutory language is clear. So is resort to the rule of lenity, contrary to petitioner's contention (Pet. 9). See, *e.g.*, *Moskal* v. *United States*, 111 S. Ct. 461, 465 (1990). *McNally* is inapposite for another reason. The Court's interpretation in *McNally* was influenced by the fact that a contrary interpretation would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." 483 U.S. at 360. No similar federalism concerns are implicated in this case.

[5] The 1926 version of ¶ 7 authorized a fine and term of imprisonment for any person who "knowingly and fraudulently * * * having been an officer or agent of any person or corporation, and in contemplation of the bankruptcy of such person or corporation, or with intent to defeat the operation of this Act, concealed or transferred any of the property of the debtor." Act of May 27, 1926, ch. 406, § 11, 44 Stat. 665. The report accompanying the legislation stated that the purpose of the amendment was "to reach behind a corporate entity in order to get at the one directly responsible for the wrongdoing." H.R. Rep. No. 877, 69th Cong., 1st Sess. 10 (1926).

[6] What is now ¶ 8 of 18 U.S.C. 152 was added at the same time as the provision that is now ¶ 7. Both of the 1926 provisions are substantially similar to the current provisions. As in the current statute, the 1926 version of ¶ 7 prohibited the fraudulent transfer or concealment of *property*, whereas the 1926 version of ¶ 8 prohibited the fraudulent concealment or transfer

Lacking contemporaneous legislative history that supports his interpretation, petitioner resorts to pre-enactment and post-enactment materials. Petitioner relies, first, on a committee report statement from 1924 concerning what is now 18 U.S.C. 153. Pet. 9 (quoting S. Rep. No. 774, 68th Cong., 1st Sess. 5 (1924)). That statement plainly has no bearing on the meaning of ¶ 7 of 18 U.S.C. 152.[7] Petitioner also relies

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of *documents* associated with a debtor's estate. The latter provision applied to conduct that occurred "after the filing of the petition, or, in contemplation of bankruptcy." Act of May 27, 1926, ch. 406, § 11, 44 Stat. 665. The similar language, structure, and subject matter of these two provisions suggest that Congress intended them to be similar in scope. Moreover, it seems unlikely that Congress intended to afford greater protection to documents than to property. Since the provision concerning documents plainly applies to both pre-petition and post-petition conduct, the provision concerning property should be construed also to apply to pre- and post-petition conduct.

[7] The committee report statement quoted by petitioner concerned an amendment to what is now 18 U.S.C. 153. The prior law had prohibited trustees from embezzling property of the estate. See Act of July 1, 1898, ch. 541, § 29a, 30 Stat. 554. The 1926 amendment extended this prohibition to apply not only to a trustee but also to a "receiver, custodian or other officer of the court." The purpose of the amendment was, as stated in the passage quoted by petitioner, "to guard against embezzlement of bankrupt estates before trustees have been appointed and qualified." S. Rep. No 774, 68th Cong., 1st Sess. 5 (1924). The 1924 legislation also amended what is now ¶ 1 of 18 U.S.C. 152. The prior law had prohibited a person's fraudulently concealing "from his trustee any of the property belonging to his estate in bankruptcy." Act of July 1, 1898, ch. 541, § 29b, 30 Stat. 554. The proposed amendment punished the fraudulent concealment of "any property belonging to the estate of a bankrupt." The report suggests that the purpose of this amendment, like the first amendment described above, was to reach concealment that occurred after the bankruptcy case commenced but before a trustee was appointed. S. Rep. No. 774, *supra*, at 5.

(Pet. 10) on a letter from the Attorney General written 35 years after the language at issue here was enacted. Here, too, petitioner's reliance is misplaced.[8] In roaming so far afield to find support for his interpretation of 18 U.S.C. 152 ¶ 7, petitioner succeeds only in demonstrating the lack of support for his reading.

Finally, petitioner's interpretation of ¶ 7 has no support in the case law. As the court of appeals recognized (Pet. App. 10a-11a), several other courts of appeals have upheld convictions under ¶ 7 based on post-petition conduct. See, *e.g.*, *United States* v. *Goodstein*, 883 F.2d 1362, 1363, 1365-1366 & n.1 (7th Cir. 1989), cert. denied, 110 S. Ct. 1305 (1990); *United States* v. *Parkhill*, 775 F.2d 612, 613-614 & n.3 (5th Cir. 1985); *United States* v. *Turner*, 725 F.2d 1154, 1156 (8th Cir. 1984).[9]

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[8] Neither the Attorney General's letter nor other legislative history concerning the 1960 amendment to what is now ¶ 7 supports petitioner's interpretation. The 1960 legislation amended the 1926 version of ¶ 7, note 5, *supra*, so that it no longer reached only persons acting as officers or agents of potential debtors but also potential debtors acting on their own behalf. Act of Sept. 2, 1960, Pub. L. No. 86-701, 74 Stat. 753. The committee report on the 1960 amendment stated that under prior law agents and officers had been subject to a "higher degree of accountability" than potential debtors, who could only be punished for post-petition conduct under what is now ¶ 1 of 18 U.S.C. 152. S. Rep. No. 974, 86th Cong., 1st Sess. 2 (1959). The statement in the report only makes sense if under prior law agents and officers could be punished for *both* pre-petition *and* post-petition conduct. If, as petitioner contends, the 1926 version of ¶ 7 punished agents and officers only for pre-petition conduct, they would have been subjected to a *different*, not a *higher*, accountability as compared to potential debtors.

[9] Moreover, in a case involving pre-petition conduct, the Fifth Circuit recognized that a charge under 18 U.S.C. 152 ¶ 7 may be "proved disjunctively" by showing that the defendant

2. Petitioner also renews his contention (Pet. 12-15) that the charges on which he was convicted were factually inconsistent. The court of appeals correctly concluded that "there is no inconsistency." Pet. App. 9a.

Petitioner argues that the proceeds that he withdrew from the Seaside Lanes partnership account cannot be both "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 and "his property" under 18 U.S.C. 152 ¶ 7. Petitioner asserts (Pet. 14) that the term "his property" in ¶ 7 refers to "property of the debtor," as the latter term is used in the Bankruptcy Code. Under the Code, his argument runs (Pet. 11), all "property of the debtor" becomes "property of the estate" upon the filing of a bankruptcy petition, and the two terms are thus mutually exclusive.

The court of appeals correctly identified the fundamental flaw in petitioner's argument: It is premised on a distinction that the statute at issue does not contain. See Pet. App. 7a, 10a. Paragraphs 1 and 7 of 18 U.S.C. 152 do not employ the terms "property of the estate" and "property of the debtor." Thus, petitioner's assertion that those terms are mutually exclusive, even if correct, would shed no light on the meaning of the different terms used in 18 U.S.C. 152. The court of appeals properly refused to ignore the language that Congress enacted to accommodate petitioner's "hypertechnical reading." Pet. App. 10a.

Moreover, petitioner misconceives the significance of filing a bankruptcy petition. The filing of a petition does not automatically extinguish a debtor's interest

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acted "in contemplation of bankruptcy *or* with intent to defeat the bankruptcy laws." *United States* v. *Haymes*, 610 F.2d 309, 310 (5th Cir. 1980).

in his property and transform that property into "property of the estate." Some property in which the debtor has an interest becomes property of the estate through recovery actions brought by the trustee after the petition is filed. See 11 U.S.C. 541(a)(3) (defining "property of the estate" to include "[a]ny interest in property that the trustee recovers under [enumerated provisions]"); see also 11 U.S.C. 542-550 (authorizing trustee to avoid certain transfers of debtor's property and to recover that property for the benefit of the estate). By the same token, the debtor does not lose all interest in his property when that property passes into the estate. For example, the debtor retains an interest in his property for purposes of exempting that property from the reach of creditors. See 11 U.S.C. 522.

The filing of a bankruptcy petition begins the process of adjusting a debtor's rights in property as against the rights of his creditors. The creation of the bankruptcy estate at the time of filing is only the first step in that process. By defining the "property of the estate" primarily in terms of the property in which the debtor has an interest, the Code forces creditors to assert their claims to the debtor's property by participating in the bankruptcy proceeding. See 11 U.S.C. 362 (automatic stay). In sum, the filing of a petition draws a line between the debtor's interests in property and those of his creditors, and not, as petitioner asserts, between the debtor's interests and those of the estate. See Pet. App. 6a (the Bankruptcy Reform Act of 1978 "was intended to create a more uniform and comprehensive scope to 'property of the estate' which is subject to the reach of debtors' creditors than had previously existed"), quoting *Goff* v. *Taylor*, 706

F.2d 574, 578 (5th Cir. 1983). See also *Begier* v. *Internal Revenue Serv.*, 110 S. Ct. 2258, 2265 (1990).[10]

Because the Code focuses on the relationship between a debtor and his creditors rather than on that between the debtor and the estate, the Code does not always distinguish between "property of the debtor" and "property of the estate." For example, Section 543(a) of the Code prohibits a custodian who possesses any "property of the estate" or "property of the debtor" from disposing of that property after a bankruptcy case commences. 11 U.S.C. 543(a). Under Section 543(b), the custodian must deliver any "property of the debtor" in his possession to the trustee. 11 U.S.C. 543(b). It would make no sense to interpret Section 543(b) to require the turnover of only that "property of the debtor" which is excluded from the estate. Accordingly, although Section 543(b) refers only to "property of the debtor," and not "property of the estate," "no one has suggested that there is any significant difference between those terms." 2 *Norton's Bankruptcy Law and Practice* § 29A:12, at 23 (1991); see also 4 *Collier on Bankruptcy* ¶ 543.01, at 543-545 n.11 (15th ed. 1990).

Nor is any such distinction made in the criminal provisions proscribing bankruptcy fraud. 18 U.S.C. 3284 provides:

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[10] Contrary to petitioner's suggestion (Pet. 7, 10), no unfairness results from construing 18 U.S.C. 152 ¶ 7 to prohibit a debtor from concealing assets that do not pass into the estate. A debtor's fraudulent transfer or concealment of his property hinders the administration of the estate whether or not the property becomes property of the estate. See *United States* v. *Cherek*, 734 F.2d 1248, 1254 (7th Cir. 1984) ("Even if the asset is not ultimately determined to be property of the estate * * *, Section 152 properly imposes sanctions on those who preempt a court's determination by failing to report the asset."), cert. denied, 471 U.S. 1014 (1985).

> The concealment of *assets of a debtor* in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or discharge denied, and the period of limitations shall not begin to run until such final discharge or denial of discharge.

(Emphasis added.) Section 3284 applies to both pre-petition and post-petition concealment of a debtor's assets. See *Sultan* v. *United States*, 249 F.2d 385, 387 (5th Cir. 1957). Thus, the offense to which Section 3284 refers—"concealment of assets of a *debtor*"—includes concealment of property that has become "property belonging to the *estate*" within the meaning of ¶ 1 of 18 U.S.C. 152. See, *e.g.*, *United States* v. *Kaldenberg*, 429 F.2d 161, 163-164 (9th Cir.) (applying Section 3284 to post-petition concealment of debtor's assets), cert. denied, 400 U.S. 979 (1970); *United States* v. *Guglielmini*, 425 F.2d 439, 441-442 (2d Cir.) (same), cert. denied, 400 U.S. 820 (1970).[11]

In sum, for purposes of the bankruptcy fraud statutes, the assets of a debtor remain his assets after a bankruptcy petition has been filed. Just as "property belonging to the estate" under 18 U.S.C. 152 ¶ 1 qualifies as the "assets of a debtor" under 18 U.S.C. 3284, so too "property belonging to the estate" under ¶ 1 may be "his property" under 18 U.S.C. 152 ¶ 7. Because the same property can fall within both ¶ 1 and ¶ 7, the

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[11] See also *United States* v. *Ivers*, 512 F.2d 121 (8th Cir. 1975). In *Ivers*, the court rejected an argument that an indictment charging the defendant with embezzling a check payable to the "bankrupt" failed to allege a violation of 18 U.S.C. 153, which prohibits embezzling property "belonging to the estate." 512 F.2d at 123-124. The *Ivers* court observed that "it is usual to speak of property of the bankrupt as synonymous with property of the estate in bankruptcy." *Id.* at 124.

court of appeals properly rejected petitioner's inconsistency argument.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1991

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[12] In the court of appeals, petitioner "carefully avoid[ed] asserting" that the charges against him under paragraphs 1 and 7 were multiplicitous, and the court of appeals accordingly did not consider that issue. Pet. App. 11a-12a. Similarly, in this Court petitioner expressly refrains from advancing an argument of multiplicitousness. Pet. 3 n.4.

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